

***United States Court of Appeals
for the Second Circuit***



**INTERVENOR'S
BRIEF**

ORIGINAL
77-4081

**United States Court of Appeals
FOR THE SECOND CIRCUIT**

No. 77-4081

NATIONAL LABOR RELATIONS BOARD,
Petitioner,
v.

SOLBORO KNITTING MILLS, INC.,
Respondent.

ON APPLICATION FOR ENFORCEMENT OF AN ORDER
OF THE NATIONAL LABOR RELATIONS BOARD

**BRIEF FOR
INTERVENOR, LOCAL 107,
INTERNATIONAL LADIES' GARMENT
WORKERS' UNION, AFL-CIO**

MAX ZIMNY
*Attorney for Intervenor, Local 107
International Ladies' Garment
Workers' Union, AFL-CIO*
1710 Broadway
New York, New York 10019
(212) 265-7000

Of Counsel:

LESTER KUSHNER
SANDRA M. NATHAN

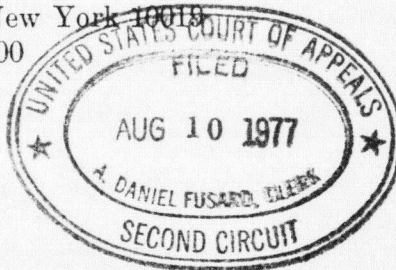


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ON APPLICATION FOR ENFORCEMENT OF AN ORDER
OF THE NATIONAL LABOR RELATIONS BOARD

**BRIEF FOR
INTERVENOR, LOCAL 107,
INTERNATIONAL LADIES' GARMENT
WORKERS' UNION, AFL-CIO**

Statement of Issues

1. Whether substantial evidence on the record as a whole supports the Board's finding that the Employer (hereafter "the Company"), violated Section 8(a)(1) of the Act by (a) coercively interrogating employees concerning their Union activities and sympathies, (b) actual and implied threats of reprisals against employees for their Union support, (c) promises of benefits to employees to enlist their support during the Union campaign and

(d) circulating a petition among its employees urging defection from the Union.

2. Whether substantial evidence on the record as a whole supports the Board's finding that the Company violated Section 8(a)(3) and 8(a)(1) of the Act by laying off and failing to recall employees Margaret Passannante, Mary White, Donna Moravec and Grace Rugolo because of their support of the Union, and whether the Board ordered proper back pay.

3. Whether the Board properly ordered the Company to bargain with the Union as the exclusive representative of its employees and found that the Company violated Section 8(a)(5) and 8(a)(1) of the Act for refusing to do so.

Statement of the Case

This case is before the Court upon application of the National Labor Relations Board, pursuant to Section 10(e) of the Act as amended (61 Stat. 136, 73 Stat. 519, 29 U.S.C. Sec. 151 *et seq.*), herein the "Act", for enforcement of its order against Solboro Knitting Mills, Inc. The Board's decision issued on January 7, 1977, and it is reported at 227 NLRB No. 89 (A. 53).^{*} This Court has jurisdiction over the proceedings because the unfair labor practices occurred in Oakdale, New York.

This brief addresses itself to only limited parts of the case, namely, the bargaining order remedy, the Board's finding of an 8(a)(5) violation and the Board's finding that the Company violated Section 8(a)(3) and 8(a)(1) of the

^{*} Since the joint appendix was not available at the time this brief was prepared, we shall refer to the pages of the record transcript. (Feb. Tr.) refers to the transcript made at the proceedings in February, 1975 and (Oct. Tr.) to the transcript made in October, 1975.

Act when it failed to recall the discriminatees at the beginning of the 1975 season. We will argue that, upon the egregious unfair labor practices found to have been committed by the Company, the Board was correct in ordering the Company to bargain with the Union to remedy the violations; that after the issue was fully litigated, the Board was correct in finding that the Company had violated 8(a)(5) of the Act; and that in requiring the Company to pay back pay to the discriminatees for its failure to recall them to work at the beginning of the 1975 season, the Board correctly applied its well-established rule.

We do not seek to duplicate the Board's brief in these enforcement proceedings by covering the unfair labor practices themselves. We are confident that the Board's brief will review the evidence in detail and will show that its unfair labor practice findings are fully supported by uncontradicted or credited evidence. We do not wish to burden the Court by traversing the same ground twice and we therefore refer the Court to the Board's brief for a full statement of that phase of the case.

In our brief, we set forth the Board's findings and conclusions only to the extent that they bear on the questions which we will discuss.

The Board's Findings and Conclusions

A. The Company violated Section 8(a)(1), 8(a)(3) and 8(a)(5) of the Act.

The Board found that the Company unlawfully interrogated, threatened and promised benefits to its employees and circulated a petition among them urging defection from the Union in violation of Section 8(a)(1), and prematurely laid off and thereafter denied reemployment to Margaret Passannante, Mary White, Donna Moravec and Grace Rugolo in violation of Section 8(a)(3) and 8(a)(1)

of the Act. The Board concluded that because of these unfair labor practices, the holding of a fair election was "impossible or at least unlikely" and that the Company should therefore bargain with the Union to remedy its misconduct. The Board also found that by refusing to recognize or bargain with the Union on or after October 4, 1974, and by embarking, instead, upon a course of unfair labor practices designed to destroy the Union's majority status and preclude the holding of a fair election, the Company violated Section 8(a)(5) and 8(a)(1) of the Act.

B. Failure to Recall the Discriminatees at the Beginning of the 1975 Season Violated the Act.

Employees Margaret Passannante, Mary White, Donna Moravec and Grace Rugolo were laid off in violation of the Act before work ran out for the 1974 season. Although the Company began rehiring laid-off employees and hiring new employees at the beginning of the 1975 season, during the week ending May 17, 1975, it did not recall the discriminatees. Thereafter, when the Company advertised for help in the newspapers in June and July 1975, the discriminatees applied for work, but the Company refused to employ them.

The Administrative Law Judge found, and the Board agreed, that the discriminatees were laid-off and thereafter denied reemployment in violation of Section 8(a)(3) of the Act. They disagreed however over whether the unlawful denial of reemployment occurred when the Company rehired other laid-off employees for the new season but did not offer to rehire the discriminatees or when the Company denied requests for reemployment by the discriminatees a couple of months later. The question before the Court is whether the discriminatees had the burden of applying for jobs at the beginning of the new season or whether the Company had the burden of offering them jobs; and whether the Board properly concluded that the

burden was on the wrongdoing Company so that the discriminatees were entitled to back pay until they received a valid offer of reemployment.

The Administrative Law Judge found that the violation regarding reemployment occurred only when the discriminatees made requests for reemployment. Both he and the dissenting Board members relied on the Company's policy of not initiating the recall of normally laid-off employees at the beginning of a new season. The dissent equated on-going seasonal employment with employment of a fixed, temporary duration in which discriminatees are not entitled to back pay beyond the time that employment would have ended in any event.

The Board majority, on the other hand, held that since the discriminatees were entitled to reinstatement and back pay, the duty of job offer so as to toll back pay was on the Company, as is normally the case. It found insufficient reason to vary the customary rule because employment was seasonal rather than non-seasonal.

It found that the jobs of the discriminatees did not terminate at the end of a season, but that the employees were temporarily laid-off at that time pending resumption of operations the next season. As the Company had a policy of rehiring the previous season's employees, the Board majority found that the discriminatees had a continuing interest in their employment. Accordingly, the Board concluded that notwithstanding the Company's policy of recalling its regular employees at the beginning of the new season after they apply for reemployment, the discriminatees were not in the same position as regular employees and they therefore had the right to be offered reinstatement to their jobs when hiring began for the new season.

We believe the facts and the law amply support the Board's findings and conclusions.

ARGUMENT

POINT I

The Board's order that the Company bargain with the Union should be enforced.

In *NLRB v. Gissel Packing Co.*, 395 U.S. 575 (1969), the Supreme Court held that the Board had the remedial power to order bargaining if the union had a card majority and the employer committed unfair labor practices which tended to undermine the union's majority and make a fair election unlikely. The Court said:

If the Board finds that the possibility of erasing the effects of past practices and of ensuring a fair election . . . by the use of traditional remedies, though present, is slight and that the employee sentiments once expressed though cards would, on balance, be better protected by a bargaining order, then such an order should issue. *Id.* at pp. 614-615.

The determination as to what unfair labor practices warrant a bargaining order remedy is left to the Board's discretion. In *Gissel*, the Supreme Court upheld bargaining orders enforced by courts of appeals where the following unfair labor practices had been found: interrogation, threats of discriminatory discharge and promise of benefits (*NLRB v. Gissel Packing Co., Inc.*, 398 F.2d 336 (C.A. 4, 1968)); interrogation, threats of reprisal, appearance of surveillance, offer of benefits and discriminatory discharge (*NLRB v. Heck's, Inc.*, 398 F.2d 337 (C.A. 4, 1968)); interrogation, threats of reprisal, and discriminatory discharge (*General Steel Products, Inc. v. NLRB*, 398 F.2d 339 (C.A. 4, 1968)); threats of job loss and plant closure and discriminatory discharge (*NLRB v. Sinclair Co.* 397 F.2d 157 (C.A. 1, 1968)).

This Court has enforced *Gissel*-type bargaining orders in cases involving the following violations: threat of plant closure, suggestion that employees form their own grievance committee, promise of wage increases, threat of reprisal and discriminatory discharges (*NLRB v. Rollins Telecasting, Inc.*, 494 F.2d 80 (C.A. 2, 1974)), *cert. denied*, 419 U.S. 964; threat to reduce work or close the plant, suggestion that employees form their own committee rather than seek union assistance, suggestion that employees break the union, cancellation of wage increase, threat of discharge and plant closure (*NLRB v. Hendel Manufacturing Co., Inc.*, 483 F.2d 350 (C.A. 2, 1973)); department closure and coercive interrogation and threats (*NLRB v. George J. Roberts & Sons, Inc.*, 451 F.2d 941 (C.A. 2, 1971)); discriminatory lay-offs, reprisals and refusal to reinstate an employee because of testimony before the NLRB (*NLRB v. V. & H. Industries, Inc.*, 433 F.2d 9 (C.A. 2, 1970)).

Bargaining orders have also been enforced by this Court on the basis of similar unfair labor practices in *NLRB v. A. Lasaponara & Sons, Inc.*, 541 F.2d 992 (C.A. 2, 1976), *cert. denied*, 45 U.S.L.W. 3600 (U.S., March 8, 1977); *M.P.C. Restaurant Corp. v. NLRB*, 481 F.2d 75 (C.A. 2, 1973); *NLRB v. International Metal Specialties, Inc.*, 433 F.2d 870 (C.A. 2, 1970), *cert. denied*, 402 U.S. 907; *NLRB v. Marsellus Vault & Sales, Inc.*, 431 F.2d 933 (C.A. 2, 1970); and *NLRB v. Perbek Oil Corp.*, 404 F.2d 105 (C.A. 2, 1968), *vacated and remanded* 395 U.S. 828 (1969), *enforced* 433 F.2d 308 (C.A. 2, 1970). See also, this Court's decision upholding a Section 10(j) injunction in a *Gissel* bargaining order case in *Seeler v. Trading Port, Inc.*, 517 F.2d 33 (C.A. 2, 1975).

In the instant case, the Board explicated its rationale for concluding that the Company's misconduct had precluded a fair election, just as this Court had suggested it

do in *NLRB v. General Stencils, Inc.*, 438 F.2d 894, 902 (C.A. 2, 1971). It found that the Union received authorization cards from nine employees in an appropriate bargaining unit of 13, that it requested recognition as the employees' collective bargaining representative, that the Company's only response to the recognition demand was to embark on an illegal course of conduct which included coercive interrogation, threats of discharge, promise of benefits, threats of reprisals, threats of job loss and plant closure. The Board also found that the Company discharged Union supporters, circulated "a petition of defection" and refused to bargain. The Board adopted the Administrative Law Judge's conclusion that the Employer's unfair labor practices were "so extensive and serious as to render impossible or at least unlikely the holding of a fair and free election." 227 NLRB No. 89 (1977); Administrative Law Judge's Decision, p. 49 (A. 49). It also adopted the ALJ's conclusion that the 8(a)(1) conduct, standing alone, was sufficient under the circumstances of the small bargaining unit to support a bargaining order:

Even absent the 8(a)(3) violation I would find the 8(a)(1) conduct, particularly Mr. Harkavy's speech [the Employer's threat to close the plant if the Union won], sufficient to support a bargaining order in such a small unit where the unfair labor practices need affect very few employees in order to foreclose a fair and free election." Administrative Law Judge's Decision, p. 49. (A. 49) [brackets added]

This Court has affirmed the Board's finding that violations which occur in a small bargaining unit tend to have great and lasting impact, and it has enforced bargaining orders based in part on such findings. *NLRB v. Scoler's Inc.*, 466 F.2d 1289, 1293 (C.A. 2, 1972) and *NLRB v. Consolidated Rendering Co.*, 386 F.2d 699 (C.A. 2, 1967).

The rule of the small bargaining unit applies to the case at bar where the bargaining unit is even smaller than the one in *Scoler's Inc., supra*, so that the damage caused by the unlawful conduct herein had an even greater impact on the ability to conduct a fair election than is generally the case.*

The Company's interference with employee rights in this case was neither minor nor isolated. It was, on the contrary, serious, widespread and strongly substantiated on the record. Clearly, the Company's misconduct cannot be adequately remedied by a cease and desist order. Such a routine, prospective direction cannot possibly ameliorate the destructive effects of the Company's wrongdoing or vindicate employee desire for Union representation. The Board's conclusion that a fair election was "impossible or at least unlikely" is very amply supported by the record evidence. This Court should therefore enforce the Board's bargaining order.

POINT II

Although the complaint did not allege a violation of Section 8(a)(5) of the Act, the Board properly found a violation.

The complaint in the case alleged, as follows:

[r]espondent, on or about October 4, 1974, refused and has continued to refuse to recognize and bargain collectively with the Union as representative of Respondent's employees, in violation of Section 8(a)(1).** (GCX 1(e); A. 72-77)

* Solboro discriminated against almost $\frac{1}{3}$ of the employees in the unit with respect to the terms and conditions of their employment (i.e., four employees of 13 were unlawfully laid off).

** Paragraph number 12 of the complaint in *Solboro Knitting Mills, Inc. and Local 107, International Ladies' Garment Workers' Union, AFL-CIO*, Case No. 29-CA-4058, issued January 6, 1975.

The refusal to bargain was not alleged as a violation of Section 8(a)(5)* presumably because of the then operative decision in *Steel-Fab, Inc.*, 212 NLRB 363 (1974), in which the Board, reversing its prior holdings, held that *Gissel*-type misconduct by an employer did not constitute an independent violation of Section 8(a)(5) and that in such cases:

. . . it is unnecessary to predicate the bargaining order on any 8(a)(5) violation. . . . [B]y issuing a bargaining order, we are remedying an employer's 8(a)(1) violations that have dissipated a union's majority and prevented the holding of a fair election. (212 NLRB at p. 363)

Between the time the complaint issued and the date of the Board's decision in this case the Board had modified its *Steel-Fab* doctrine and returned to its earlier view of the law. In *Trading Port, Inc.*, 219 N.L.R.B. 298 (1975), the Board found that where an employer refuses to recognize and bargain with a union which enjoys majority support and subsequently commits substantial unfair labor practices so as to preclude a fair election or make it unlikely, the employer is guilty of violating Section 8(a)(5) of the Act. Since the complaint herein alleged an unlawful refusal to recognize and bargain, the Employer had full notice of the claim it was required to defend and the Board's failure to allege that the charged misconduct also violated Section 8(a)(5) did not deprive the Employer of due process of law. *NLRB v. Mackay Radio & Telegraph Co.*, 304 U.S. 333 (1938); *NLRB v. Scenic Sports-wear*, 475 F. 2d 1226 (C.A. 6, 1973). As the court held

* Section 8(a)(5) of the Act provides:

- (a) It shall be an unfair labor practice for an employer
 - (5) to refuse to bargain collectively with the representative of his employees, subject to the provisions of section 9(a).
- 29 U.S.C. § 158(a)(5).

in *NLRB v. Scenic Sportswear, supra*, there is no denial of due process

. . . so long as the complaint informs the respondent of the acts which constitute the charged unlawful behavior and respondent is given an opportunity to respond. *Id.* at p. 1227.

The claim of unlawful refusal to bargain was fully litigated. The facts which the Board had to adduce to prove the unlawful refusal to bargain were the same, whether or not characterized as a violation of Section 8(a)(5); and the Employer's defense was also the same.

Where a matter is litigated, even though the particular violation has not been specifically charged, the Board may properly find such a violation. *United Packinghouse, Food and Allied Workers International Union v. NLRB*, 416 F.2d 1126, 1134, footnote 12 (C.A. D.C. 1969), *cert. denied*, 396 U.S. 903. See also *Montgomery Ward & Co. v. NLRB*, 385 F.2d 760 (C.A. 8, 1967) and *American Boiler Manufacturers Association v. NLRB*, 366 F.2d 815 (C.A. 8, 1966). Accordingly, the Board's conclusion that Section 8(a)(5) was violated should be enforced.

POINT III

The Board's finding that the employer violated the Act by failing to recall the discriminatees at the beginning of the new season should be affirmed.

Since the earliest days of the Act, the customary remedy for a discriminatory discharge has been reinstatement and back pay. *Phelps Dodge Corp. v. NLRB*, 313 U.S. 177, 187 (1941); *Matter of Pennsylvania Greyhound Lines, Inc.*, 1 NLRB 1 (1935), enforced *NLRB v. Pennsylvania Greyhound Lines, Inc.*, 303 U.S. 261 (1938); *First Annual Report of the National Labor Relations Board*, p. 128 (1936).

The purpose of the remedy is to restore the *status quo ante* so as to remove or avoid the consequences of a violation which thwarts the establishment of collective bargaining and the maintenance and promotion of industrial peace. *Phelps Dodge, supra*, at pp. 193, 194; *National Licorice Co. v. NLRB*, 309 U.S. 350, 362 (1940); *Consolidated Edison Co. v. NLRB*, 305 U.S. 197, 236 (1938). The remedy has the twin objectives of protecting the rights of the discriminatees and vindicating the public interest in maintaining industrial peace. *Albermarle Paper Co. v. Moody*, 422 U.S. 405, 419 (1975); *NLRB v. Rutter-Rex Mfg. Co.*, 396 U.S. 258, 263 (1969); *Nathanson v. NLRB*, 344 U.S. 25, 27 (1952); *Phelps Dodge, supra*, at 197; *Ford Motor Company*, 31 NLRB 994, 1099 (1941).

Reinstatement of discriminatorily discharged employees is favored over other important policy considerations. *NLRB v. International Van Lines*, 409 U.S. 48 (1972). In *International Van Lines*, the Supreme Court held that even though economic strikers are entitled to their jobs only if they have not been replaced by the time they offer to return to work, if such strikers are discriminatorily discharged before they have been replaced, they are entitled to be treated as ordinary discriminatees and to unconditional reinstatement. Though on strike, such discriminatees are entitled to uninterrupted back pay until the employer offers reinstatement. The burden of offering reinstatement is on the employer. Likewise, the four employees in this case were discriminatorily laid off and were entitled to back pay until the Company offered them their jobs back. They were not required, as a condition of back pay, to request reinstatement and be denied jobs by the Company, just as if they were non-discriminatees. The teaching of *International Van Lines* is to the contrary.

Law, policy and practical considerations require that when an employer unlawfully discharges an employee, the wrongdoer, not the victim, has the burden of tolling back

pay. *NLRB v. Southern Greyhound Lines*, 426 F.2d 1299 (C.A. 5, 1970); *G.P.D. Inc. v. NLRB*, 406 F.2d 26, 32, n.6 (C.A. 6, 1969), *cert. denied* 401 U.S. 974; *Bituminous Material & Supply Co. v. NLRB*, 281 F.2d 365 (C.A. 8, 1960); *Idaho Potato Growers, Inc. v. NLRB*, 144 F.2d 295 (C.A. 9, 1944), *cert. denied*, 323 U.S. 769; *New York Handkerchief Mfg. Co. v. NLRB*, 114 F.2d 144 (C.A. 7, 1940), *cert. denied* 311 U.S. 704; *NLRB v. Sunshine Mining Co.*, 110 F.2d 780 (C.A. 9, 1940), *cert. denied*, 312 U.S. 678. Nor can the employer fulfill its obligation to offer reinstatement to discriminatees simply by instructing them to "keep in touch" concerning further employment. *NLRB v. Buckhorn Hazard Coal Corp.*, 472 F.2d 53, 56 (C.A. 6, 1973).

For the same reason, the burden of initiating the recall to work cannot be shifted to discriminatees merely because an employer has a policy, applicable to regular employees, of not recalling employees unless they have notified the employer of a desire for employment. In *Carbide Tools, Inc.*, 205 NLRB 318 (1973), enforced, 492 F.2d 795 (C.A. 6, 1974), which is similar to the case at bar, the Board affirmed an Administrative Law Judge's finding that an employer is required to offer jobs to discriminatees even though the employer never had a policy of recalling laid-off employees.

It is hornbook law that under the Act an employer has the obligation of offering to reinstate discriminatorily discharged employees in order to toll its back pay liability. This obligation does not terminate merely because, as in this case, work is seasonal and it is the employer's practice to await a request for reinstatement from its regularly laid-off employees. The practice applied to regular employees may not be applied to the aberrant employment situation which results from the employer's misconduct. It would be anomalous indeed to permit an employer whose violation of federal law resulted in the illegal termination of employment to benefit by shifting the burden

of restoring the *status quo ante* from perpetrator to victim. The Board was plainly correct in holding that the burden continues to rest upon the employer whether the discriminatees are in non-seasonal employment, as in *Carbide Tools, Inc.*, or in seasonal employment, as in this case. We submit that the Board's application of the holding of *Carbide Tools, Inc.* to this case is fully supported by law, sound policy and sensible practical considerations.

The burden of undoing the wrong properly belongs on the wrongdoer. By unlawfully discharging its employees, the Company violated their rights. Until the Company offers them reinstatement, the wrong remains unremedied. Requiring the discriminatees herein to make job applications before they could be reinstated would improperly shift the burden. Such a result would contradict the strong public policy favoring a full remedy for discrimination, *NLRB v. International Van Lines, supra*, as well as the principle that the tortfeasor is liable for the reasonably foreseeable consequences of its acts and has the burden of separating those consequences for which it is chargeable from those for which it is not. *NLRB v. Remington Rand, Inc.*, 94 F.2d 862, 872 (C.A. 2, 1938), *cert. denied* 304 U.S. 576.

Practical considerations also require that the burden of offering reinstatement remain on the wrong-doing employer. As a practical matter, requiring discriminatees to initiate their recall would amount to requiring them to actively police their employer's seasonal start-up time, at their peril. It would also require them to perform a futile act, as this case demonstrates. Here, after their lay-offs, several of the discriminatees called the Company to inquire about employment, but were told repeatedly that there was no work available. (A. —) (Feb. Tr. 154-56, 258, 263-64, 483-84) Similarly, although the Company contended that its policy was to tell laid-off employees to "keep in touch," the Company's principal admitted that

at least two of the discriminatees had not received such instructions. (A. —) (Oct. Tr. 86-87, 109) They had no notice of the Employer's policy of requiring normally laid-off employees to apply for reemployment at the beginning of each season. The discriminatees did not apply for reinstatement when hiring began for the 1975 season, but, apparently badly in need of work, they filed applications a couple of months later when the Company advertised for help in the local newspaper. Their applications were as futile later as they would have been earlier; the Company rejected their applications for employment. Neither the earlier nor the later applications would have been rejected if the discriminatees had not been Union adherents because it was the Company's policy to rehire all its old employees at the beginning of the new season. (A. —) (Oct. Tr. 47-48, 96)*

As a matter of fact, the Company's policy with respect to hiring only after employee notice is far from clear. Although the Company testified that it was normal policy not to recall employees without notice from them, the Board found that at times the recall is initiated by the Employer. (A. 58) (227 NLRB No. 89, Sl. op. at p. 6) Even if there were no other ground for rejecting the Employer's contention that its asserted policy should be given greater weight than the right of the discriminatees

* P. 47 Q. "Are there occasions when people contact you to come back to work for you in a new season, when you don't hire them back?"

A. "... it has happened, but very isolated cases, and I really don't recall anyone specifically. ..."

P. 48 Q. "What do you do in a situation where someone contacts you and you don't want them back?"

A. "It has happened once or twice ..." (A.).

* * *

P. 96 A. All our employees, and the record will show repeatedly, each and every one, perhaps some isolated case, have returned year in and year out. (A.)

to reinstatement and back pay, the uncertainty over the Employer's recall policy requires that the issue be resolved against the Employer.

Equity requires the same result. Where unfair labor practices are proven, doubts about the proper remedy are to be resolved against the wrongdoer. *Amsterdam Wrecking & Salvage Co., Inc. v. Local 294, International Brotherhood of Teamsters, Chauffeurs, Warehousemen and Helpers of America*, 472 F.2d 153 (C.A. 2, 1973). In that case, employees were discriminatorily discharged because they had signed authorization cards for the union. In response to the employer's unconditional offer of reinstatement, the employees said they would return to work only if the employer recognized the union. The union subsequently filed an unfair labor practice charge. When the employer learned of the charge, he told the employees they would be rehired only if they withdrew the charge. The Court found that a back pay order was proper from the date the employer imposed the illegal condition since the Board had found that it could not be determined with certainty whether the employees would not have returned at an earlier time. The Court explained that "[a]ny doubts regarding the employees' attitudes toward reinstatement properly were resolved against the employer" where the employer precipitated the uncertainty by its misconduct, 472 F.2d, at p. 154. See also *Philip Carey Manufacturing Co. v. NLRB*, 331 F.2d 720 (C.A. 6, 1964), *cert. denied*, 379 U.S. 888, and *cf. NLRB v. International Van Lines, supra*; *NLRB v. Gissel Packing Co., supra*. Thus, in this case, where the Company's misconduct is so clearly proven, doubts regarding the Company's policy of requiring regularly laid-off employees to apply for jobs at the beginning of a new season must be resolved in favor of the discriminatees and against the Employer.

Just as an employer policy requiring employee notification before recall cannot properly be applied to dis-

criminatees in non-seasonal employment, employees cannot lawfully suffer diminution of their rights under the Act merely because they are employed in a seasonal industry. Placing discriminatees in a seasonal industry in no better position than new employees or old employees who have not suffered from discriminatory discharge applies equal standards to unequal subjects. It also equates the rights of employees who would normally be recalled upon application with the rights of employees who had no reason to think that it would be anything but futile to ask for employment from an employer who had discharged them for exercising their legal rights.

Relying on the case of *Temperature Systems Corp.*, 195 NLRB 1023 (1972), the dissenting members of the NLRB contended that the discriminatees herein enjoy no greater rights than those of discriminatees temporarily employed on a job which comes to a complete end at a fixed time. But clearly seasonal employment in the garment or other industries with a high expectation of recall for laid-off employees, as is here the case, is a far cry from pre-determined temporary employment which comes to an end. Countless workers employed in the apparel trades and elsewhere work seasonally for the same employer for many, many years on end. They accumulate retirement and other employment credits predicated upon such longevity. It defies reality to equate seasonal employees with temporary employees.

The Company's employees are laid off at the end of one season and rehired at the beginning of the next season, as indicated earlier. The discriminatees herein plainly have a continuing interest in continued employment, punctuated only by seasonal lay-offs. *Temperature Systems Corp.*, *supra*, is therefore inapposite.

Finally, the Board is invested with broad authority to fashion remedies for violations of the Act. *Phelps Dodge*

Corp., supra, at p. 194. The responsibility to adapt the Act to changing patterns of industrial life is entrusted to the Board (*NLRB v. J. Weingarten, Inc.*, 420 U.S. 251, 266 (1975)), and courts of appeals impermissibly encroach on the Board's function if they displace the Board's judgment with their own. The Board has the special and exclusive responsibility for applying the general provisions of the Act to the complexities of industrial life (*NLRB v. Erie Resistor Corp.*, 373 U.S. 221, 236 (1963)), and its special competence in this field is the justification for the deference accorded its determinations, *Gissel Packing Co. v. NLRB*, *supra*, at p. 612, n. 32; *American Ship Building Co. v. NLRB*, 380 U.S. 300, 316 (1965); *San Diego Building Trades Council v. Garmon*, 359 U.S. 236, 242-243 (1959). The court's right to modify or overrule the Board's exercise of its remedial powers is limited so long as the Board does not act in a manner which clearly fails to effectuate the purposes of the Act. As the Supreme Court said in *Fibreboard Paper Products Corp. v. NLRB*, 379 U.S. 203 (1964), reviewing the Board's authority under Section 10(c) of the Act:*

That section 'charges the Board with the task of devising remedies to effectuate the policies of the Act.' *Labor Board v. Seven-Up Bottling Co.*, 344 U.S. 344, 346. The Board's power is a broad discretionary one, subject to limited judicial review. *Ibid.* '[T]he relation of remedy to policy is peculiarly a matter for

* Section 10(c) of the Act provides in pertinent part:

... If upon the preponderance of the testimony taken the Board shall be of the opinion that any person named in the Complaint has engaged in or is engaging in any such unfair labor practice, then the Board shall state its findings of fact and shall issue and cause to be served on such person an order requiring such person to cease and desist from such unfair labor practice, and to take such affirmative action including reinstatement of employees with or without back pay, as will effectuate the policies of this Act . . . 29 U.S.C. § 160(c).

administrative competence . . . ' *Phelps Dodge Corp. v. Labor Board*, 313 U.S. 177, 194. 'In fashioning remedies to undo the effects of violations of the Act, the Board must draw on enlightenment gained from experience.' *Labor Board v. Seven-Up Bottling Co.*, 344 U.S. 344, 346. The Board's order will not be disturbed 'unless it can be shown that the order is a patent attempt to achieve ends other than those which can fairly be said to effectuate the policies of the Act.' *Virginia Elec. & Power Co. v. Labor Board*, 319 U.S. 533, 540. *Id.* at p. 216.

Here, the Board has concluded that the discriminatees were entitled to be recalled to work when the Company began rehiring for the 1975 season. That conclusion is supported by law, precedent and public policy. It cannot be said to attempt to achieve ends other than those which effectuate the policies of the Act. Accordingly, the discriminatees were entitled to an offer of employment when the Employer began to recall employees for the new season and the Board's conclusion to this effect should be enforced.

CONCLUSION

For the foregoing reasons, we respectfully request that the Court enter judgment enforcing the Board's order in full.

Dated: New York, New York
August 10, 1977

Respectfully yours,

MAX ZIMNY
Attorney for Intervenor, Local 107
International Ladies' Garment
Workers' Union, AFL-CIO
1710 Broadway
New York, New York 10019
(212) 265-7000

Of Counsel:

LESTER KUSHNER
SANDRA M. NATHAN

(61780)

UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

NATIONAL LABOR RELATIONS BOARD,

Petitioner,

against

SOLBORO KNITTING MILLS, INC.,

Respondent.

State of New York,
County of New York,
City of New York—ss.:

IRVING LIGHTMAN

being duly sworn, deposes

and says that he is over the age of 18 years. That on the 10th
day of August, 1977, he served two copies of the
Brief for Intervenor, Local 107, I.L.G.W.U. on
Rains, Pogrebin & Scher, Esqs. and on Elliott Moore,
Deputy Associate General Counsel, N.L.R.B.

the attorney^s for the Respondent and for the Petitioner,
respectively
by depositing the same, properly enclosed in a securely sealed
post-paid wrapper, in a Branch Post Office regularly maintained
by the Government of the United States at 90 Church Street, Borough
of Manhattan, City of New York, directed to said attorney^s at
No. 210 Old Country Road, Mineola, N.Y. () N.Y.,
N.L.R.B., Washington, D.C. 20570
that being the address designated by them for that purpose upon
the preceding papers in this action.

Irving Lightman

Sworn to before me this

10th day of August, 1977.

Courtney Brown
COURTNEY J. BROWN
Notary Public, State of New York
No. 31-5472920
Qualified in New York County
Commission Expires March 30, 1978

